

Add Article 2.5 (commencing with Section 30210) to the Revenue and Taxation Code to require the tax, interest and penalties to become immediately due and payable on all unlicensed cigarette and tobacco products distributors. Also add Article 5 (commencing with Section 30355) to the Revenue and Taxation Code to facilitate the seizure and sale of assets to satisfy liens created due to this part.

Source: Investigations Division

Under existing Cigarette and Tobacco Products Tax Law, an excise tax of 6 mills (or 12 cents per package of 20) is imposed on each cigarette distributed. Proposition 99 imposes an additional surtax of 12 1/2 mills per cigarette (25 cents per package of 20) effective January 1, 1989. Beginning January 1, 1999, Proposition 10 imposes an additional surtax of 25 mills per cigarette (50 cents per package of 20) for a current total tax of 43 1/2 mills per cigarette (87 cents per package of 20).

For tobacco products (which are defined to include cigars, smoking tobacco, chewing tobacco, snuff, and other products containing at least 50 percent tobacco), a tax is imposed on the wholesale cost of the tobacco products distributed at a rate which is equivalent to the combined rate of tax imposed on cigarettes. An additional tax, pursuant to Proposition 10, imposes an additional tax on tobacco products based on the wholesale cost of the tobacco products distributed at a rate which is equivalent to the additional 50-cent per pack tax on cigarettes. The tobacco products tax rate is determined annually by the Board. As of November 8, 2001, the tax rate on tobacco products ranges from 52.65 percent to 490 percent of the wholesale cost (depending on the tobacco product) for the period July 1, 2001 through June 30, 2002.

Existing law provides that if any person fails to make a report or return, the Board shall make an estimate of the number of cigarettes or the wholesale cost of tobacco products distributed by him or her. Upon the basis of this estimate, the Board shall compute and determine the amount required to be paid to the state, adding a penalty of 10 percent. Any person against whom a determination is made, as specified, may petition for a redetermination within 30 days after service upon the person of notice thereof. If a petition for redetermination is not filed within the 30-day period, the determination becomes final at the expiration of the period.

A jeopardy determination may be issued if the Board believes that the collection of any amount of tax required to be paid by any person will be jeopardized by delay. If the amount that is due is not paid within 10 days after service upon the person of notice of the determination, the determination becomes final, unless a petition for redetermination is filed within the 10 days. Determinations are due and payable at the time they become final. The collection of the amounts due and payable generally can not take place until the determination becomes final.

Prior to Proposition 99, tobacco products were not taxed and the tax on cigarettes was paid by the sale of tax stamps. Proposition 99 commenced the taxing of tobacco products, which is based on the wholesale cost of the product at a rate determined annually. The Tobacco Products surtax is imposed on the distributor and is paid on a monthly return. Proposition 99 did not change the manner in which the taxes on cigarettes are paid.

Subsequent to the passage of Proposition 99, unlicensed transient and other distributors were importing tobacco products into the state and distributing them without reporting and paying the tax due. After the passage of Proposition 10 in November 1998, the Investigations Division discovered a counterfeit tax stamp problem with unlicensed distributors importing cigarettes from out-of-state.

The Board's Investigations Division has encountered a large number of cigarettes and tobacco product distributors who are unlicensed. The purpose for being unlicensed is to conceal the nature of their business and to evade the tax. These unlicensed distributors normally maintain minimal assets and are typically transient, which hinders the Board's ability to collect the taxes due and payable. The Board's difficulty in collecting amounts due from these unlicensed distributors is best evidenced by the Cigarette and Tobacco Products Taxes receivables, which consists of 198 accounts. Of these 198 accounts, 23 are directly related to work done by the Investigations Division and account for 94 percent of the accounts receivable balance.

Prior to a search warrant, the Investigations Division has been able to determine in advance that a liability is due by using third party sources. Five recent cases where search warrants were served, large sums of cash in the amounts of \$125,000, \$48,000, \$200,000, \$59,000 and \$58,000, for a total \$490,000, were not seized for lack of authority to issue immediate billings. Subsequent collection efforts based on current law have been unsuccessful, as that cash is no longer available. In each of these cases, Investigations Division was aware that the subject would owe a large liability to the state.

This proposal would provide that the tax, and applicable penalties and interest become immediately due and payable on account of all products distributed if a person becomes a distributor without first securing a license. This proposal would also add seizure and sale provisions to the Cigarette and Tobacco Products Tax Law to facilitate the administration of the sections providing for the immediate liability for the tax.

These suggested changes are necessary for the efficient and effective administration of the Cigarette and Tobacco Products Tax Law. Allowing the Board to recover cash and assets available at the time of the billing, as specified, would be a tremendous aid in the Board's collection effort as these assets are typically not accessible at a later date. These suggested changes mirror similar provisions currently in the Diesel Fuel Tax Law.

Article 2.5 (commencing with Section 30210) is added to Chapter 4 of Part 13 of Division 2 of the Revenue and Taxation Code to read:

Article 2.5. Payment by Unlicensed Persons

30210. If any person becomes a cigarette or tobacco products distributor without first securing a license, the tax, and applicable penalties and interest, if any, become immediately due and payable on account of all cigarettes or tobacco products distributed. All cigarettes or tobacco products manufactured in this state or transported to this state, and no longer in the possession of the unlicensed distributor, are considered to have been distributed.

30211. The board shall forthwith ascertain as best it may the amount of the cigarettes or tobacco products distributed and shall determine immediately the tax on that amount, adding to the tax a penalty of 25 percent of the amount of tax or five hundred dollars (\$500), whichever is greater, and shall issue a jeopardy determination to the unlicensed person pursuant to section 30241 and give the unlicensed person notice per section 30244 of the Cigarette and Tobacco Products Tax Law. However, where the board determines that the failure to secure a license was due to reasonable cause, the penalty may be waived. Sections 30242 and 30243 shall be applicable with respect to the finality of the determination and the right of the unlicensed person to petition for a redetermination.

Any person seeking to be relieved of the penalty shall file with the board a statement under penalty of perjury setting forth the facts upon which he or she bases the claim for relief.

30212. The board shall forthwith collect the tax, penalty, and interest due from the unlicensed person by seizure and sale of property in the manner prescribed for the collection of a delinquent monthly tax.

30213. At the request of the board, the Attorney General shall commence and prosecute to final determination an action at law to collect the tax, penalty, and interest, or any part thereof, determined against an unlicensed person.

30214. In the suit, a copy of the jeopardy determination certified by the board shall be prima facie evidence that the unlicensed person is indebted to the state in the amount of the tax, penalties, and interest computed as prescribed by Section 30223.

30215. The foregoing remedies of the state are cumulative.

30216. No action taken pursuant to this article relieves the unlicensed person in any way from the penal provisions of this part.

Article 5 (commencing with Section 30355) is added to Chapter 5 of Part 13 of Division 2 of the Revenue and Taxation Code to read:

Article 5. Seizure and Sale.

30355. Whenever any person is delinquent in the payment of the obligations imposed under this part, the board or its authorized representative may seize any property, real or personal, subject to the lien of the tax and thereafter sell the property, or a sufficient part of it, at public auction to pay the tax due together with any interest and penalties imposed for the delinquency and any costs incurred on account of the seizure and sale.

30356. Notice of the sale and the time and place thereof shall be given in writing at least 20 days before the date set for the sale to the delinquent person and to all persons who have an interest of record in the property seized. The notice shall be personally served or enclosed in an envelope addressed to the person at his or her last known residence or place of business in this state. If not personally served, the notice shall be deposited in the United States mail, postage prepaid. The notice shall be published pursuant to Section 6063 of the Government Code, in a newspaper of general circulation published in the city in which the property or a part thereof is situated if any part thereof is situated in a city or, if not, in a newspaper of general circulation published in the county in which the property or a part thereof is located. Notice shall also be posted in both of the following manners:

(a) One public place in the city in which the interest in property is to be sold if it is to be sold in a city or, if not to be sold in a city, one public place in the county in which the interest in the property is to be sold.

(b) One conspicuous place on the property. The notice shall contain a description of the property to be sold, a statement of the amount due, including tax, penalties, interest, and costs, the name of the person, and the further statement that unless the amount is paid on or before the time fixed in the notice of sale, the property, or so much of it as may be necessary, will be sold in accordance with law and the notice.

30357. At any sale the board or its authorized agent shall sell the property in accordance with the law and the notice and shall deliver to the purchaser a bill of sale for the personal property and a deed for any real property sold. The bill of sale or deed vests title in the purchaser. The unsold portion of any property seized may be left at the place of sale at the risk of the taxpayer.

30358. If upon any sale the moneys received exceed the amount due to the state from the taxpayer, the board shall return the excess to the taxpayer and obtain his or her receipt. If any person having an interest in or lien upon the property files with the board prior to the sale notice of his or her interest or lien, the board shall withhold payment of any excess pending a determination of the rights of the

respective parties to the excess moneys by a court of competent jurisdiction. If for any reason the receipt of the taxpayer is not available, the board shall deposit the excess moneys with the Controller, as trustee for the taxpayer, his or her heirs, successors, or assigns.